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Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea

This Note reproduces a submission from the Government of the Republic of Korea containing a summary of the intersessional regional meeting on ISDS reform held on 10 and 11 September 2018 in Incheon, Republic of Korea. The English version of the summary was submitted on 28 September 2018 and the text received by the Secretariat is reproduced as an annex to this Note.

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Annex

1. At its thirty-fifth session (New York, 23–27 April 2018), the Working Group welcomed a proposal from the Government of the Republic of Korea to organize an intersessional regional meeting on ISDS reform with the objectives of raising awareness in the Asia-Pacific region of the current work of the Working Group, and providing input to the current discussions. It was clarified that the meeting would be purely informational and that no decisions would be made. It was further mentioned that a summary report would be submitted to the next session of the Working Group for its consideration (A/CN.9/935, para. 11).

2. At its fifty-first session (New York, 25 June–13 July 2018), the Commission welcomed the invitation of the Republic of Korea to an intersessional regional meeting to be held in Incheon on 10 and 11 September 2018. The Commission took note that, while it was clear that no decisions would be taken at the intersessional meeting, the event would provide an open forum for high-level government representatives and relevant stakeholders in the Asia-Pacific region to discuss issues being deliberated by Working Group III.[1]

3. Accordingly, the first Inter-sessional Regional Meeting on ISDS Reform was held on 10 and 11 September 2018 at the Songdo Convensia in Incheon, Republic of Korea under the auspices of the Trade Law Forum (http://tradelawforum.com/). The Inter-sessional Regional Meeting was co-organized by the Ministry of Justice of the Republic of Korea, the Korea Legislation Research Institute (KLRI), the Korean Commercial Arbitration Board (KCAB) International, the Incheon Metropolitan City and the United Nations Commission on International Trade Law (UNCITRAL). The Inter-sessional Regional Meeting consisted of a one-day Conference providing regional perspectives on ISDS reform followed by a half-day roundtable discussions.

4. As indicated above, the objectives of the Conference were to raise awareness in the Asia-Pacific region of the current work of the Working Group, and to provide an opportunity to reflect on the ISDS experience in the Asia-Pacific region, further contributing to the discussions at the Working Group. The round table was to provide a forum for government representatives from the Asia-Pacific region to provide input to the current discussion at the Working Group. The Inter-sessional Regional Meeting was open to all those invited to the Working Group including delegations from other regions as well as other relevant stakeholders.

5. The Inter-sessional Regional Meeting was attended by a total of 191 participants, including government officials from 34 States (Afghanistan, Australia, Austria, Cambodia, Cameroon, Canada, China, Egypt, Iraq, Japan, Kuwait, Laos People's Democratic Republic, Mali, Mexico, Mongolia, Morocco, Myanmar, Nepal, Netherlands, Pakistan, Paraguay, Philippines, Qatar, Republic of Korea, Senegal, Singapore, Spain, Sri Lanka, Sudan, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Vietnam) and representatives from the European Commission, the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) as well as a number of non-governmental organizations.

The Conference (10 September 2018)

6. The Conference was opened by the Minister of Justice of the Republic of Korea (Mr. Sang-ki Park), who noted the increasing importance of ISDS in the Asia-Pacific region. The president of KLRI (Mr. Ik Hyeon Rhee), the chairman of KCAB International (Mr. Hi-Taek Shin) and the Mayor of Incheon (Mr. Nam Chun Park) also delivered welcome addresses.

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 146.

7. The Secretary of UNCITRAL then provided a general overview of UNCITRAL's work in the field of dispute settlement and the mandate of Working Group III on ISDS reform. It was highlighted that the Inter-sessional Regional Meeting was an effort to benefit from the widest possible breadth of available expertise from all stakeholders and to obtain high-level input from all governments as indicated in the Commission's mandate to the Working Group. The importance of transparency and experience-sharing in the Working Group process was emphasized.

8. The chairperson of Working Group III (Mr. Shane Spelliscy) then provided an overview of the concerns identified by the Working Group during the last two sessions, namely concerns pertaining to the consistency, coherence, predictability and correctness of arbitral decisions, to arbitrators and decision-makers, and to the cost and duration of ISDS cases. Noting that the Commission had expressed its appreciation for the progress made thus far, the chairperson noted that the Working Group was expected to address the second stage of its mandate at its next session while remaining open to the identification of any additional concerns. He encouraged increased participation from the region and mentioned the travel fund supported by the European Union and Switzerland to support participation of representatives of developing and least developed countries in sessions of the Working Group.

9. The Conference then proceeded to discuss the concerns identified during the past two Working Group sessions in four separate panels. The panels were construed to facilitate open discussion among the participants with speakers briefly presenting their perspectives on the topic followed by an interactive dialogue. Advance copies of notes prepared by the Secretariat for the thirty-sixth session of the Working Group were provided to the participants as reference material (A/CN.9/WG.III/WP.149 to 153).

Panel on costs and duration

10. The panel on costs and duration was moderated by Ms. Anna Joubin-Bret and consisted of the following speakers: Mr. Matthew Hodgson (Partner, Allen & Overy, Hong Kong), Ms. Sue Hyun Lim (Secretary-General, KCAB International) and Mr. Gonzalo Flores (Deputy Secretary-General, ICSID).

11. The panel discussion was based on currently available data on the cost and duration of investor-State arbitration, including mean and median party and tribunal costs, average length of proceedings, cost allocation trends as well as enforcement and settlement of cost awards. With regard to ICSID proceedings, it was indicated that the average duration for the period between July 2017 to June 2018 was 3.8 years for arbitration proceedings and 1.9 years for annulment proceedings.

12. By way of comparison, the PCA provided data on the duration of a few recent inter-State proceedings. It was noted that the anticipated length of proceedings was difficult to predict because of the varied nature of the cases. It was also noted that where parties set a time limit, the tribunals usually respected them. As to costs, figures similar to that of ISDS cases were not available for inter-State arbitration since the parties generally bore their own costs with no awards on cost being rendered.

13. It was stated that the regional experience in investor-State arbitration as well as commercial arbitration has led to a general perception that arbitration was no longer a faster and cheaper dispute resolution method. In that context, potential causes of increased costs and delays were discussed, such as lack of clarity in the rules, varied expectations of parties, dilatory tactics, scheduling difficulties and the inadequate use of party-appointed expert witnesses.

14. It was noted that the three main stages where time and cost could be reduced were the constitution of the tribunal, the written process including document production and rendering of the award. Concerns were expressed with regard to a lack of mechanisms for States to recover costs (it was mentioned that 37 per cent of cost awards in favour of respondent States remained unpaid) and the role of security for costs was highlighted. It was also noted that government officials might not be in a

position to agree to certain procedural measures to save costs and avoid delays, considering the potential risks associated with them.

15. Possible ways to reduce cost and duration were also mentioned. It was noted that measures to address such concerns as outlined in A/CN.9/WG.III/WP.153 provided a good starting point for discussion and focus was put on the introduction of timelines, active and effective case management, other means of amicable settlement, expedited procedures, early dismissal mechanisms and cost allocation. References were made to the proposed amendments to the ICSID Rules, including expedited arbitration. The possible establishment of an advisory centre to assist States before and during the ISDS proceedings also drew the attention of participants. References were made to domestic laws capping recoverable costs as a means to increase efficiency. While the wide variation in costs may make it difficult to set a definitive cap, it was said that tribunals could address the divergence of the circumstance in their awards on cost. Overall, the need to further improve the efficiency of ISDS was shared by the participants.

16. During the discussion, representatives of non-governmental organizations expressed concerns about the high cost associated with ISDS proceedings, in particular for developing countries, which may utilize the required financial resources for other policy reasons. The need to respect the States' right to regulate for such policy purposes was emphasized and it was further suggested that the proposed reforms should not be limited to procedural aspects but be broader to encompass substantives provisions in investment agreements.

Panel on the lack of predictability, correctness and coherence

17. The panel on the lack of predictability, correctness and coherence was moderated by Ms. Vilawan Mangklatanakul (Director-General, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand) and consisted of the following speakers: Ms. Karin L Kizer (Attorney-Adviser, Office of the Legal Adviser, Department of State, United States), Mr. Colin Brown (Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, Directorate-General for Trade, European Commission) and Mr. Shotaro Hamamoto (Professor, Graduate School of Law, Kyoto University).

18. The panel discussion focused on the importance and desirability of correctness, predictability and coherence of ISDS awards and their implications in the proper functioning of the ISDS regime as well as its legitimacy. The panel also focused on the underlying reasons that could have resulted in the seeming lack of such characteristics in the current ISDS regime. In that context, the public international law aspects of ISDS (being treaty-based), the existence of numerous investment agreements with broadly-drafted yet similar provisions, the ad hoc nature of ISDS tribunals, variance of parties to ISDS and limited possibilities of review were mentioned. Concerns were expressed not only with regard to inconsistency of awards but also to inconsistency in decisions on challenges to arbitrators.

19. The approaches of other international judicial bodies, such as the International Court of Justice (ICJ) and International Tribunal for the Law of the Sea (ITLOS), on the issue of consistency were mentioned. For example, reference was made to an ICJ decision which held that the issue was whether there was any cause not to follow the reasoning and conclusions of earlier cases. While the need to follow earlier decisions and thus to avoid fragmentation was highlighted, instances where departure from earlier decisions could be justified (for example, change of societal views, or a manifestly incorrect decision) were also mentioned. It was also cautioned that pursuit of consistency might inadvertently result in the consolidation of wrong decisions.

20. It was also stated that questions relating to the lack of consistency and predictability were relative and that in the current ISDS regime, the point of reference should be whether the interpretation by the tribunals was consistent with the intent of the parties to an investment treaty. In that context, the decentralized nature of the current ISDS regime, both politically and operationally, was highlighted. It was

further mentioned that a number of factors contributed to different decisions by tribunals (for example, the clarity of the treaty language, the facts of the case, litigation techniques and level of experience of the disputing parties) and that these factors need to be considered when assessing whether the apparent inconsistency may be justified.

21. Existing tools and efforts by States to enhance predictability, correctness and coherence were mentioned. They included more precise drafting of substantive obligations in investment treaties thus providing less discretion to tribunals in their interpretation. Different approaches to ISDS, excluding investment arbitration entirely from investment agreements, relying on State-to-State dispute resolution or excluding certain sectors from ISDS were also noted. It was stated that consistent submissions by States, the use of non-disputing party submissions, enhanced transparency and publication of pleadings and awards, consolidation of proceedings with the same facts and circumstances under a single treaty, limitations on parallel proceedings and binding interpretations by the treaty parties were tools that would promote correctness of decisions, consistent with the intentions of the treaty parties. In that context, it was also mentioned that the ad hoc nature of the current ISDS regime, which allows for competing interpretations, might eventually lead to the emergence of correct decisions.

22. On the other hand, it was said that the existing tools and efforts mentioned above would not sufficiently address the concerns and that systemic reform was therefore necessary. For example, the use of binding interpretation was possible only in limited circumstances and even carefully drafted language in investment treaties would not guarantee predictability as abstract notions were often subject to interpretation. It was also pointed out that treaties are often intentionally drafted with open-ended language. It was mentioned that systemic change could bring permanence creating predictability and consistency and that the introduction of an appeal mechanism could ensure correctness.

23. A number of questions were raised about how a systemic reform would address the concerns expressed and the mechanism to bring about such systemic reforms. It was mentioned that the Mauritius Convention on Transparency could provide a model to implement such systemic reforms to the existing ISDS regime.

24. Discussion also occurred concerning whether and how an appellate mechanism could enhance consistency, correctness and predictability of ISDS awards and a wide range of views were expressed.

25. In that context, reference was made to the core public law issues involved in ISDS, including legitimate welfare objectives, which should be assessed through domestic courts. On the other hand, international tribunals had the jurisdiction to, and had in fact, overturned domestic court decisions. It was also said that domestic court decisions should not interfere with international obligations, and a multilateral tribunal would provide the appropriate forum to assess these obligations.

Panel on arbitrators including a code of ethics

26. The panel on arbitrators (decision-makers) was moderated by Ms. Natalie Yu-Lin Morris-Sharma (Director, International Legal Division, Ministry of Law, Singapore) and consisted of the following speakers: Mr. Seung-wha Chang (Dean, Seoul National University School of Law, former member of the World Trade Organization (WTO) Appellate Body), Mr. Jeremy Sharpe (Partner, Sherman & Sterling London) and Ms. Christel Tham (Legal Counsel, Permanent Court of Arbitration).

27. At the outset, it was queried whether the party-appointment mechanism, which was drawn from international commercial arbitration, was fully suitable in the ISDS context. Potential alternatives included a roster or list system, so that potential arbitrators would be nominated before the dispute arose, which would allow States to look beyond the needs of a particular case and incentivise them to nominate

well-balanced arbitrators. The practice in ICSID of States nominating persons to the panel of arbitrators (and its rigidity) and of WTO with an indicative list of panel members were cited.

28. Recent trends in State practice with regard to appointment of arbitrators were shared. It was identified that in addition to independence and impartiality, qualities often required of arbitrators were expertise in public international law and investment law, subject-matter expertise and sectoral or case-specific knowledge. Emphasis was put on the need for arbitrators to understand how governments operated, to give effect to treaty provisions specifically negotiated by States (including tools for States to be involved in treaty interpretation) and to understand the important public policy consideration underlying ISDS cases. In that context, the need for States to re-examine their own practices of appointing arbitrators as well as nominating to the ICSID panel of arbitrators was mentioned. It was also noted that some States made efforts to avoid repeat appointments of arbitrators whereas others found it difficult to diversify arbitrators from outside the usual pool.

29. Noting that the appointment process was mostly party-driven, the PCA shared its experience in ISDS as appointing authority and its efforts to ensure the effectiveness of the arbitration and to protect the parties' access to justice. Statistics with regard to challenges to arbitrators in over 190 cases which the PCA administered was shared and it was stated that mechanism was "functioning". It was indicated that 80 per cent of the cases proceeded without any challenge, and that among the cases where an arbitrator was challenged, less than half resulted in a change in the composition of the tribunal.

30. The discussions then revolved around ethical requirements of arbitrators in ISDS cases, such as reflected in disclosure requirements and at issue in challenge procedures. It was mentioned that there have been continuous efforts to develop a code of conduct as well as guidelines on the topic resulting in some existing texts. It was further mentioned that issue conflicts in ISDS cases needed to be approached differently from that in commercial arbitration and suggestions were made that provisions tailored to issues conflicts in ISDS cases could be codified. In that context, reference was made to the relevant provisions in the code of conduct maintained by the WTO for both panellists and Appellate Body members.

31. While recognizing the benefits of such efforts and of existing codes of conduct, it was cautioned that they may need to be further tailored to the ISDS context (including the public policy aspect) and that overlap among such codes should be avoided. The possible interaction among a number of codes as well as with national laws was mentioned.

32. Discussions also evolved around a number of related issues including the need for a code of conduct for arbitrators and mediators, so-called "double-hatting" and the apparent bias as a perceived risk and the lack of arbitrators from the Asia-Pacific region handling ISDS cases.

Panel on third-party funding

33. The panel on third-party funding was moderated by Mr. Jiang Chenghua (Deputy Director-General, Department of Treaty and Law, Ministry of Commerce, China) and consisted of the following speakers: Ms. Teresa Cheng (Secretary for Justice, Hong Kong Special Administrative Region) and Mr. Nikolaus Pitkowitz (Partner, Graf & Pitkowitz, Vienna).

34. At the outset, the increasing impact that third-party funding has had on ISDS was noted and it was suggested that the topic required careful consideration in conjunction with a number of topics previously discussed. It was further mentioned that the concept as well as the regulation of third-party funding would need to be considered in the context of existing notions such as the doctrines of maintenance and champerty, confidentiality and preservation of privilege. With regard to the definition, references were made to the 2014 IBA Guidelines on Conflicts of Interest, the

ICCA-Queen Mary Task Force Report on Third-Party Funding and the proposed amendments to the ICSID Arbitration Rules.

35. The panel discussions evolved around the advantages and disadvantages of third-party funding generally and more specifically in the context of ISDS. It was however noted that such advantages and disadvantages were subjective in nature and relative to a number of other elements. For example, while third-party funding could enhance access to justice for investors, respondent States may not obtain such funding resulting in a systemic imbalance. While third-party funding might incentivize claims resulting in an increased number of ISDS cases, due diligence by funders might operate as a filter against frivolous or unmeritorious claims. While third-party funders would generally favour improved case management, there existed the risk of excessive control by the third-party funders of the proceedings.

36. The discussion also touched upon a number of issues specific to ISDS including conflict of interests among all stakeholders, security for costs when third-party funding is involved and the possibility of enforcing cost awards against third-party funders. It was further pointed out that third-party funding posed a more fundamental public policy question relating to the legitimacy of ISDS, as third-party funders would be profiting from a dispute between an investor and a State. In response, it was noted that there was a need to recognize the existence of a market for such third-party funding. Questions about admissibility of claims were also raised.

37. It was mentioned that regulation of third-party funding would entail discussion of the scope of such funding and who would be able to access it. It would typically require disclosure of the third-party funder but the details remained open for discussion. In that context, a question was raised on how to ensure the compliance of any disclosure requirements and remedies available to address any non-compliance by the parties.

38. Questions relating to whether third-party funding of mediation could be conducive to amicable settlement of disputes, whether there was a linkage between third-party funding and the amount claimed by investors and the fact that States had limited access to third-party funding as they usually did not suffer damages and as they did not necessarily have the opportunity to raise counterclaims were posed during the discussion.

The roundtable discussions (11 September 2018)

39. On 11 September 2018, two roundtable discussions took place with government representatives and other participants sharing their views on concerns relating to ISDS and on the desirability of reforms in light of those concerns. The two roundtable discussions were moderated by Mr. Jaemin Lee (Professor, Seoul National University School of Law) and Mr. Shane Spelliscy respectively.

40. The participants were reminded of the three-stage mandate of the Working Group. They were also reminded that the focus of the deliberations at the Working Group was on reforms to procedural aspects of ISDS and not on the underlying substantive obligations in investment agreements. It was also mentioned that considering the progress made by the Working Group, discussions on possible reform options would only be preliminary.

41. The concerns raised and identified by the Working Group during its two previous sessions and discussed the previous day at the Conference (as outlined in document A/CN.9/WG.III/WP.148) were generally shared by the participants. In conjunction with those concerns, a number of questions were raised on existing and proposed tools to address such concerns and discussions also evolved around the desirability of such reforms.

42. Nonetheless, it was also mentioned that the existing ISDS regime was relatively stable and predictable, providing investors and States a sound mechanism to resolve disputes in a de-politicized manner. It was also said that existing tools along with

minor adjustments could effectively address concerns raised particularly with regard to cost and duration.

43. The importance of dispute prevention (including a joint committee of the treaty parties) and other means of dispute resolution (including mediation) to reach an amicable settlement was highlighted. The use of cooling-off periods and mandatory consultations were also mentioned. With respect to mediation, it was noted that the ability for governments to settle might be limited particularly when compensation for damages were involved and the difficulties in coordination among relevant agencies within the government was mentioned. It was added that these tools were currently being under-utilized and efforts should be taken to increase their use, though it was also noted that unsuccessful attempts to settle could lengthen proceedings in some cases.

44. A number of proposed reforms to address the lack of consistency and to ensure correctness of awards were discussed, including scrutiny of awards and a system of precedents. A general issue was whether there might be tension between the twin aims of correctness and consistency. It was said that cases with similar legal issues and facts could be addressed together to enhance predictability and to reduce costs. However, it was also highlighted that reforms should not depart from a treaty-based approach. It was said that States should retain the authority to comment on interpretation of treaty provisions they negotiated.

45. As regards arbitrators, there was broad agreement that three areas required further elucidation. First, rules on conflicts of interest, external activities and double-hatting; second, arbitrator qualifications, which should include expertise in public international law and a balanced understanding of public policy. Third, gender balance and greater regional diversity, especially increasing appointment of arbitrators from developing States. It was added that recent treaties had attempted to address those issues, and that the recent expansion of the arbitrator community could facilitate such reforms. Finally, it was agreed that increased transparency in appointments would be critical for a successful reform.

46. A number of questions related to how a systemic reform of the ISDS regime could be implemented through the establishment of a permanent body. Questions related to the organization and structure of such a body; budget requirements and funding; ways to obtain the consent of the investors to the new dispute resolution mechanism; and finality as well as enforcement of the decisions by the permanent body.

47. A number of comments were made with regard to an appeals mechanism and its possible benefits, particularly in achieving correctness and consistency of awards. Similar to discussions at the Conference, a number of questions were raised on how such mechanism could be introduced to the current ISDS regime. Caution was expressed that introduction of an appellate stage could have a negative impact on the overall duration of ISDS proceedings.

48. In addition, the need for ISDS reforms to take into account other policy considerations such as sustainable development, human rights and environment, was mentioned. It was suggested that representatives of bodies responsible for such issues within and outside the United Nations system should be given the opportunity to voice their views in the Working Group. Recognizing the importance of the governments' right to regulate and the regulatory chill that may result from ISDS, a view was expressed by a member of civil society that the current ISDS regime lacked legitimacy and should be replaced in its entirety.

49. More generally, it was stated that the Inter-sessional Regional Meeting provided an opportunity for States not having participated in the Working Group to keep abreast of the recent developments and for States in the Asia-Pacific region and others to share their experience and to discuss common issues on ISDS. It was also mentioned that the difference in format (presentations on specific topics followed by question and answers) allowed for a more candid discussion and the opportunity for certain

States to develop internal capacity and expertise. It was stated that this would allow them to take part in the Working Group discussion more easily. It was further noted that the Inter-sessional Regional Meeting provided a number of civil society representatives the opportunity to provide input to the Working Group. In that context, it was generally felt that there would be benefit in holding additional intersessional meetings and in other regions.

50. The participants generally agreed on the importance of wide and diverse representation in the Working Group from all stakeholders, and of coordination between the UNCITRAL Secretariat and other relevant international organizations such as the United Nations Conference on Trade and Development, the Organization for Economic Cooperation and Development, ICSID and PCA. In addition, the transparency of the UNCITRAL process and the provision of the breadth of the materials available from various sources on its website were welcomed.

51. Participants expressed their gratitude to the Ministry of Justice of the Republic of Korea and the UNCITRAL Secretariat as well as other co-hosts for organizing the first Inter-sessional Regional Meeting on ISDS Reform and hoped that the discussions at the Inter-sessional Regional Meeting could provide useful input in the Working Group session scheduled for Vienna from 29 October to 2 November 2018.